

In Whose Best Interest? Exploring the Continuing Viability of the Parental Immunity Doctrine

I. INTRODUCTION

A cursory examination of recent decisions reveals a truth which has escaped neither judicial nor scholarly notice: “[t]he parental immunity defense is anything but simple, and is certainly not an impenetrable shield.”¹ Recognition of the problems engendered by parental immunity, however, has not lead to critical rectification of the doctrine. Legal commentators have failed to squarely address the difficult questions raised by parental immunity, while state and federal courts have neglected to consistently and adequately define the doctrine’s parameters. Needless to say, the confused landscape of parental immunity is ripe for reform.

Through a comprehensive assessment of judicial opinions in various jurisdictions, this Note seeks to establish a more clarified understanding of the parental immunity doctrine as it exists today, and to further suggest the manner in which the scope of that immunity may be most logically understood and applied. Part II details the origin and historical development of the doctrine, while Part III examines two recent decisions which manifest the difficulties courts have encountered in applying the parental immunity defense. Finally, Part IV describes a method for interpreting the scope of parental liability which has been implicit in recent decisions but nonetheless obscured in the dialogue between supporters and detractors of the doctrine.

II. THE ORIGIN AND HISTORICAL DEVELOPMENT OF THE PARENT-CHILD IMMUNITY DOCTRINE

A. *From Common Law to Judicial Intervention*

Despite retention of custody by parents, the child was a distinct and separate legal entity at common law.² Evidence of this fact is found in cases where the child was “entitled to the benefits of his own property and to the enforcement of his own choses in action including those in tort.”³ The retention

¹ Mary J. Long & Davidson Ream, *Parent-Child Tort Immunity*, FOR THE DEFENSE Jan. 1990 at 1, 23. Other commentators agree that “[t]he cases have not yet drawn a clear picture of parental liability.” W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 122 at 908 (5th ed. 1984).

² KEETON ET AL., *supra* note 1, at 904.

³ RESTATEMENT (SECOND) OF TORTS § 895G cmt. a (1979); *see, e.g.*, *Alston v. Alston*, 34 Ala. 15 (1859); *Crowley v. Crowley*, 56 A. 190 (N.H. 1903).

of custody by parents over their unemancipated children,⁴ however, was not without consequence. As parents were charged with the duty of rearing and disciplining their children, it was traditionally recognized that a parent had the right to inflict bodily injury (within the sphere of non-criminal behavior) and was therefore privileged.⁵ It was within the scope of this privilege that the doctrine of parental immunity arose, whereby a child was prohibited from maintaining an action in tort against his or her parent.⁶

In a series of cases commonly referred to as the "great trilogy,"⁷ American courts established the role of immunity in tort actions between parent and child. The first decision recognizing parental immunity was reached in *Hewlette v. George*.⁸ In *Hewlette*, the court found a parent who had wrongfully committed her child to an asylum for the mentally insane immune from suit.⁹ Enunciating what would come to be one of the most widely cited justifications for parental immunity,¹⁰ the court stressed a concern for the preservation of familial

⁴ The *Restatement (Second) of Torts* states:

[S]ince most of the justifications advanced for the immunity have concerned the relation of a parent and his minor child who is under his custody and control and for whose support he is responsible, it was held almost from the beginning that the immunity did not apply to adult children or to minor children who had been emancipated by the surrender of the right to their services and earnings and of parental control over them.

RESTATEMENT (SECOND) OF TORTS § 895G, cmt. d (1979).

⁵ William E. McCurdy, *Torts Between Persons in a Domestic Relation*, 43 HARV. L. REV. 1030, 1059 (1930).

⁶ The parent-child immunity rule has also been generally recognized as prohibiting actions in tort by parents against their children. See, e.g., *Hatzinicholas v. Protopapas*, 533 A.2d 1311, 1312 (Md. 1987) (citing *Latz v. Latz*, 272 A.2d 435 (Md. 1971)). The scope of this Note, however, concerns only actions brought by unemancipated minors against their parents.

A recent development in the sphere of parental immunity involved the consideration of whether a child could maintain a cause of action against her mother for unintentionally inflicted prenatal injuries. See *Stallman v. Youngquist*, 531 N.E.2d 355 (Ill. 1988). While the *Stallman* court declined to impose liability on the mother in light of the parental immunity doctrine, the issue of fetal rights has continued to be an expanding and hotly debated area of law. For a detailed discussion of the *Stallman* decision, see Kathryn S. Banashek, Comment, *Stallman v. Youngquist*, 68 WASH. U. L.Q. 189 (1989). For a more comprehensive discussion of fetal rights, see Note, *Medical Technology & the Law: State Intervention during Pregnancy*, 103 HARV. L. REV. 1556 (1988).

⁷ Edwin D. Akers & William H. Drummond, *Tort Actions Between Members of the Family—Husband and Wife—Parent and Child*, 26 MO. L. REV. 152, 182 (1961).

⁸ 9 So. 885 (Miss. 1891).

⁹ *Id.*

¹⁰ The preservation of domestic tranquility has remained an important justification cited by courts upholding the parental immunity doctrine. See, e.g., *Davis v. Grinspoon*,

harmony, which could only be jeopardized by permitting a child to maintain such an action.¹¹

The decision to recognize parental immunity in *Hewlette* was soon followed by *McKlevey v. McKlevey*.¹² In *McKlevey*, the court provided an additional justification for shielding parents from liability by way of an analogy with interspousal immunity; just as a wife was to obey her husband, so a child was subject to parental control and charged with a subsequent duty of obedience owing to the parent.¹³ Accordingly, the *McKlevey* court refused to sustain an action by the child against the parent for cruel and inhumane punishment.¹⁴

The final case comprising the trilogy was *Roller v. Roller*.¹⁵ In that decision, the court extended the concept of parental immunity to its conceivable limits by barring a daughter's action against her father for rape.¹⁶ Further

570 N.E.2d 1242 (Ill. 1991); *Schlessinger v. Schlessinger By and Through Schlessinger*, 796 P.2d 1385 (Colo. 1990).

Other courts, however, have argued that where a child has suffered injury due directly or indirectly to the actions of the parent, the harmony between family members has already been disrupted. Thus, a concern for the continued preservation of that harmony is an insufficient rationale for finding parental immunity as a bar to the child's action. *See Hurst v. Capitell*, 539 So. 2d 264 (Ala. 1989). In an analogous fashion courts have permitted actions by children whose custodial relationships with the parties responsible for the children's injuries have ceased to exist. In such instances the courts have reasoned that like the relationship itself, the very notion of domestic tranquility has been terminated. *See Newsome v. Department of Human Resources*, 405 S.E.2d 61 (Ga. 1991) (where foster parents no longer stood *in loco parentis* at time action was filed, harmony justification for parental immunity no longer applied); *Johnson v. Meyers*, 277 N.E.2d 778 (Ill. 1972) (child permitted to bring action against deceased parent's estate as relationship and harmony between child and parent had ceased to exist).

¹¹ *Hewlette*, 9 So. at 886.

¹² 77 S.W. 664 (Tenn. 1903).

¹³ *Id.* at 665. The notion of analogizing parental immunity with interspousal immunity, however, has been the subject of some criticism. *See* RESTATEMENT (SECOND) OF TORTS § 895G, cmt. c (1979) (the analogy of interspousal immunity is inapplicable to the immunity existing between parent and child because of the difference in the original common-law concept of relations); *see also* Scott T. Schreiber, Note, *The Unsupervised Child: Parental Negligence or Necessity?*, 15 VAL. U.L. REV. 167, 174 (1980) (analogy inapposite as child's identity was not merged with parent as were identities of husband and wife at common law). Accordingly, while courts have continued to support the parental immunity doctrine with an emphasis on the necessity of parental control and authority over children, they have refrained from relying upon the concept of interspousal immunity.

¹⁴ *McKlevey*, 77 S.W. at 664, 665.

¹⁵ 79 P. 788 (1905).

¹⁶ *Id.* A recent decision with facts reminiscent of those in *Roller* may be found in *Barnes v. Barnes*, 566 N.E.2d 1042 (Ind. 1991) (discussed in detail *infra*, part III).

considerations advanced by the *Roller* court in favor of a rule of parental immunity were (1) preventing the parent's potential reacquisition of the child's tort damages through intestate succession, in the event the child predeceased the parent, and (2) preserving the family exchequer (*i.e.*, funds for the entire family's life necessities) from depletion via damages collected in a judgment against the parents.¹⁷

1. *Expansion of the Parental Immunity Doctrine*

Subsequent to the "great trilogy," expansion of parental immunity continued in terms of the doctrine's scope, the rationales supporting its existence, and the variety of contexts in which it was applied. One emergent justification for the doctrine was the prevention of fraud and collusion which courts feared would be perpetrated by family members at the expense of liability insurers.¹⁸ The express concern of courts advancing this justification was that permitting a minor child to sue his or her parents would not only make such collusive efforts possible, but actually encourage that fraudulent practice.¹⁹ Currently, however, the fear of collusion is being widely assailed as an insufficient rationale for maintaining parental immunity.²⁰ As a corollary to this critical approach assumed by the courts, children sustaining injuries have

Surprisingly enough, the conclusion in *Barnes* is virtually indistinguishable from that reached by the *Roller* court.

¹⁷ *Roller*, 79 P. at 788-89. Further support for the decision in *Roller* was presented in *Bulloch v. Bulloch*, 163 S.E. 708 (1932) (parental immunity rule justified so as to preserve family exchequer), and at least one recent decision, *Schlessinger v. Schlessinger By and Through Schlessinger*, 796 P.2d 1385 (Colo. 1990), has cited the necessity of preventing depletion of family assets as a continuing justification for parental immunity. *But see KEETON ET AL.*, *supra* note 1, at 905 (concern for preservation of the family exchequer does not outweigh the desirability of compensating the injured child). In *Sneed v. Sneed*, 705 S.W.2d 392 (Tex. 1986), the court permitted a child to sue his deceased parent's estate. In doing so, the court noted "it is hard to understand why a child may not be compensated for an injury by his parent while a stranger will be allowed to deplete the 'family exchequer' to the detriment of the tortfeasor's children." *Id.* at 397.

¹⁸ *See Villaret v. Villaret*, 169 F.2d 677 (D.C. Cir. 1948); *Parks v. Parks*, 135 A.2d 65 (Pa. 1957). A recent decision citing the prevention of fraud and collusion between family members as a viable rationale for maintaining the parental immunity defense may be found in *Davis v. Grinspoon*, 570 N.E.2d 1242 (Ill. 1990).

¹⁹ *Davis v. Grinspoon*, 570 N.E.2d 1242 (Ill. 1990).

²⁰ *See Unah By and Through Unah v. Martin*, 676 P.2d 1366, 1369 (Okla. 1984). The court found that the effectiveness of the jury system would ensure protection of liability insurers from fraudulent claims. *See also Kirchner v. Crystal*, 474 N.E.2d 275 (Ohio 1984). In that decision the court held: "The deterrent effect of a perjury charge, extensive and detailed pretrial discovery procedures, the opportunity for cross-examination and the avoidability of summary judgment motions are but a few examples of the tools available to our judicial system in exposing fraudulent claims in any lawsuit." *Id.* at 278.

been permitted to sue their parents for recovery up to the limits of any existing liability insurance.²¹

Another significant issue courts have dealt with in the sphere of parental immunity has involved determining which parties are entitled to claim the doctrine as a defense. A crucial development has been expanding the doctrine to protect those standing *in loco parentis* to the child.²² One decision supporting the application of the doctrine to those *in loco parentis* was reached in *Gunn v. Rollings*.²³ In *Gunn* the court reasoned that where one is *in loco parentis*, the rights, duties, and liabilities of such a person are the same as those of a natural parent, and that such a person is bound for the maintenance, care, and education of the child so long as the relationship exists.²⁴ Accordingly, such individuals are equitably entitled to the same rights and protections afforded to natural parents.²⁵ Far from being established as a steadfast rule, though, immunity for those *in loco parentis* has been qualified in a number of recent decisions.²⁶ Courts also remain divided on the issue of

²¹ In such instances, courts have reasoned that the real defendant in the action is not the parent at all but in fact the liability insurer. Accordingly, children are permitted to sue their parents as a means of realizing compensation from the insurer. See *Martin*, 676 P.2d at 1370 ("We hereby qualify the rule of parental immunity in this jurisdiction to allow an action for negligence arising from an automobile accident brought on behalf of an unemancipated minor child against a parent to the extent of the parent's automobile liability insurance."); *Ard v. Ard*, 414 So. 2d 1066 (Fla. 1982); *Yates v. Lowe*, 348 S.E.2d 113 (Ga. 1986).

²² See, e.g., *Bennett v. Bennett*, 390 S.E.2d 276 (Ga. 1990) (parental immunity applies for grandparents standing *in loco parentis*); *Lawber v. Doil*, 547 N.E.2d 752 (Ill. 1989) (stepfather who stood *in loco parentis* entitled to parental immunity); *Brown v. Phillips*, 342 S.E.2d 786 (Ga. 1986) (immunity exists for foster parents who were *in loco parentis*).

²³ 157 S.E.2d 590 (S.C. 1967).

²⁴ Romualdo P. Eclavea, Annotation, *Liability of Parent for Injury to Unemancipated Child Caused by Parent's Negligence—Modern Cases*, 6 A.L.R.4TH 1066, 1090 (1989).

²⁵ See *supra* notes 23 and 24 and accompanying text.

²⁶ See *Newsome v. Department of Human Resources*, 405 S.E.2d 61 (Ga. 1991) (foster parents prohibited from asserting defense of parental immunity where injured children had been removed and placed with another foster family at time action was filed); *Mayberry v. Pryor*, 374 N.W.2d 683 (Mich. 1985) (foster parents who accepted child placements from state have no immunity); *Andrews v. County of Otsega*, 446 N.Y.S.2d 169 (1982) (foster parents were merely contract service providers assuming contractual duty to provide supervisory care, and thus held responsible for failure to use reasonable care); *Gulledge v. Gulledge*, 367 N.E.2d 429 (Ill. 1977) (parental immunity not extended to include those having temporary control and custody of a minor, such as grandparents or others). But see Vincent S. Nadile, Note, *Promoting the Integrity of Foster Family Relationships: Needed Statutory Protections for Foster Parents*, 62 NOTRE DAME L. REV. 221 (1987) (recommending state funded liability insurance to protect foster parents from liability for negligent acts).

whether parental immunity stands as a bar to actions brought by unemancipated minor children against non-custodial parents,²⁷ or whether parents and children acting within the scope of their mutual employment have transcended the established boundaries of the parent-child relationship to the extent that application of parental immunity is no longer justified.²⁸

Frequently, parties outside the familial domain subject to a child's personal injury action will seek to join the child's parents as third-party defendants.²⁹ A

²⁷ Courts which have found that parental immunity may not serve as a defense for noncustodial parents have noted that where a parent lacks custody, he or she also lacks the established position of control and authority which justifies the imposition of immunity. Accordingly, the doctrine is not a procedural bar to the child's action as no purpose is served in maintaining that bar. *See* *Buffalo v. Buffalo*, 441 N.E.2d 711 (Ind. 1982); *Turner v. Turner*, 304 N.W.2d 786 (Iowa 1981).

Yet, other courts have reasoned that lack of custody does not alter the fundamental parent-child relationship to the extent that the purpose served in maintaining the parental immunity defense is illusory. *See* *Smith v. Gross*, 571 A.2d 1219 (Md. 1990) (parental immunity doctrine applicable to children born out of wedlock and not within custody of alleged negligent parent); *Edgington v. Edgington*, 549 N.E.2d 942 (Ill. 1990) (father lacking custody of minor children not liable for injuries sustained in accident where he was operating motor vehicle).

²⁸ In the landmark decision of *Felderhoff v. Felderhoff*, 473 S.W.2d 928 (Tex. 1971), the Supreme Court of Texas permitted a 14-year-old unemancipated minor to sue for injuries sustained while in the employ of a farming partnership in which his father was a partner. The court reasoned that the relationship between the father as partner and the son as employee was indistinguishable from that of any other employment relationship, and that in the absence of the special parent-child relationship the application of immunity would not be justified. *Id.* at 932-33. A contrary result was reached in *Hatzinicholas v. Protopapas*, 533 A.2d 1311 (Md. 1987), in which the court held that a child's action against his father's business partnership for injuries sustained in the operation of the partnership business was barred by the doctrine of parental immunity. In refusing to permit the injured child to maintain his action against the partnership, the *Hatzinicholas* court reasoned that "appellants would be able to do indirectly what they could not do directly, that is, obtain damages in their suit against appellee that in the end would be payable in part by the injured child's father. That result would be inconsistent with the rationale of the parent-child immunity doctrine." *Id.* at 1313.

²⁹ Defendants seeking contribution from parents as third-party defendants often allege that in breaching a duty owed to their own children, parents stand as joint tortfeasors equally responsible for the injuries the child has sustained. In *Parsons v. Wham-O, Inc.*, 541 N.Y.S.2d 44 (1989), a child injured on a water slide manufactured by defendants sought recovery against them for her injuries. Defendants subsequently sought to bring a third-party action for contribution against the parents, alleging that the parents' failure to properly instruct their child on the use of the water slide constituted actionable negligence. The New York court, however, found that the parents' failure to properly instruct their child constituted only negligent parental supervision, which does not create a cause of action in that jurisdiction based on the decision reached in *Holodook v. Spencer*, 324 N.E.2d 338

number of courts have refused to sustain such claims, however, citing parental immunity as a bar to the third-party actions instituted by defendants.³⁰

2. *Defining the Scope of Parental Immunity*

Perhaps the most critical issue to be resolved in the sphere of parental immunity involves defining the doctrine's scope. Central to the debate is the manner in which the delicate balance between the autonomous parent-child relationship³¹ and the right of an injured child to receive compensation for his or her injuries³² should be achieved. While contemporary courts have refrained from either completely abrogating the doctrine or, conversely, maintaining the

(N.Y. 1974). Thus, the court refused to permit defendants to maintain their third-party claim against the parents.

³⁰ See *Parsons v. Wham-O, Inc.*, 541 N.Y.S.2d 44 (1989); *Brunner v. Hutchinson Div., Lear-Siegler, Inc.*, 770 F. Supp. 517 (W.D.S.D. 1991); *Schneider v. Coe*, 405 A.2d 682 (Del. 1979). But see *Walker v. Milton*, 268 So. 2d 654 (La. 1972) (contribution permitted in favor of defendant against parent whose negligence had contributed to child's injuries).

³¹ In *Foldi v. Jeffries*, 461 A.2d 1145 (N.J. 1981), the court cogently described the imperative of a relatively autonomous parent-child relationship in a democratic society:

There are certain areas of activities within the family sphere involving parental discipline, care, and control that should and must remain free from judicial intrusion. Parents should be free to determine how much the physical, moral, emotional, and intellectual growth of their children can best be promoted. That is both their duty and their privilege. Indeed, every parent has a unique philosophy of the rearing of children. That philosophy is an outgrowth of the parent's own economic, educational, cultural, ethical, and religious background, all of which affect the parent's judgment on how his or her children should be prepared for the responsibilities of adulthood. Such philosophical considerations come directly to the fore in matters of parental supervision. . . .

The parent is clearly in the best position to know the limitations and capabilities of his or her own children. These intangibles cannot be adequately conveyed within the normal atmosphere of a courtroom. Nor do we believe that a court or a jury can evaluate these highly subjective factors without somehow supplanting the parent's own individual philosophy.

Id. at 1152.

³² In discussing the right of injured children to pursue an action against their father for injuries sustained in an accident precipitated by the alleged negligence of the father in operating a motor vehicle, Justice Mauzy of the Supreme Court of Texas noted that "[t]o allow a recovery here to all relatives, friends or acquaintances, but not to the driver's own children, would be a denial of the children's right to legal redress." *Jilani v. Jilani*, 767 S.W.2d 671, 674 (Tex. 1988) (Mauzy, J. concurring).

parental immunity as an absolute defense, the ground between these two extremes remains fraught with complications and uncertainties.

One line of cases has established that immunity no longer exists where the parent's negligence constitutes a breach of a duty thought to be owed to the world at large.³³ Essentially, courts have reasoned that where the act is one of general negligence beyond the privileged boundaries of the parent-child relationship, deference to parental control and authority (and the immunity which is the product of such deference) is no longer justified.³⁴ Circumstances involving injuries to children as a result of their unsupervised or negligent use of dangerous instrumentalities have also provided grounds for courts piercing the shield of parental immunity.³⁵ Finally, courts have permitted children to maintain actions against their parents for willfully reckless conduct³⁶ or intentionally tortious actions, particularly in instances of physical or sexual abuse.³⁷

³³ See, e.g., *Grivas v. Grivas*, 496 N.Y.S.2d 757 (1979) (parental liability for child's injury premised on violation of duty owing to all, i.e., operation of lawn mower with reasonable care); *Cummings v. Jackson*, 372 N.E.2d 1127 (Ill. 1978) (violation of ordinance to trim trees by parents resulted in liability when child struck by third-party operating motor vehicle).

³⁴ In the decision of *Goedkoop v. Ward Pavement Corp.*, 378 N.Y.S.2d 417 (1976), an infant child was injured upon tampering with explosive caps negligently maintained by his father. The explosives had originally been obtained by the child from a construction site and subsequently confiscated from the child's possession by the father. When the injured child sued the construction company, the court permitted a third-party claim by the defendant on the grounds that the father's negligent maintenance of the explosives was a violation of a duty owed to all and not one deriving specifically from the traditional parent-child relationship.

Similarly, an Arizona court concluded in the decision of *Schleier for Alter v. Alter*, 767 P.2d 1187 (Ariz. 1989), that parents could be liable for a dog bite injury sustained by their child when the failure to properly control the animal was a violation of a duty owed to the world at large.

³⁵ See, e.g., *Aquaviva v. Piazzolla*, 458 N.Y.S.2d 979 (1982) (parental liability imposed on parents for failure to protect their infant child from injury resulting from an older son's unauthorized control of the family's motor vehicle, when harm resulted from a foreseeable abuse of a dangerous instrumentality by that older child); *Nolechek v. Gesuale*, 385 N.E.2d 1268 (N.Y. 1978) (third-party action permitted against parent where injury to child resulted from negligent entrustment by parent of dangerous instrumentality to child).

³⁶ See *Hoffman v. Tracy*, 406 P.2d 323 (Wash. 1965) (parental liability exists for injury sustained by child resulting from parent's operation of motor vehicle while intoxicated).

³⁷ See *Hurst v. Capitell*, 539 So. 2d 264 (Ala. 1989); *Wilson by Wilson v. Wilson*, 742 F.2d 1004 (6th Cir. 1984).

In New York, a number of decisions (beginning with the court's opinion in *Holodook v. Spencer*³⁸) have established that allegations of conduct considered to be negligent supervision on the part of a parent are not actionable.³⁹ In accordance with the rationale set forth in *Holodook*,⁴⁰ the New York courts have placed primary emphasis on the belief that supervision of unemancipated minor children is both inherent to and definitive of the family relationship. Thus, the bar that parental immunity poses for actions sounding in negligent supervision derives from the reluctance of the judiciary in New York to interfere with parental duty and privilege.⁴¹

Despite the multitude of divergent and seemingly irreconcilable approaches the courts have adopted with respect to parental immunity, two distinct interpretations of the doctrine have been favored by courts in recent years. The first was established by the Wisconsin Supreme Court in the 1963 decision of *Goller v. White*.⁴² In that opinion, the court held that the parental immunity doctrine would be abrogated in negligence cases except where the alleged negligent act involved an exercise of (1) parental authority over the child or (2) ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, or other care.⁴³ Implicit in the court's reasoning was a belief that deference to parental authority and discretion was justified only in limited contexts, *i.e.*, the relatively traditional roles assumed by parents as guardians and providers of care. Accordingly, subsequent decisions employing reasoning analogous to that of *Goller* have established that the privilege of immunity for parents remains circumscribed by a judicial determination of whether or not the alleged negligent conduct transpired within the traditional boundaries of parental authority or care.⁴⁴ It is noteworthy,

³⁸ 324 N.E.2d 338 (N.Y. 1974). Consolidated with *Holodook* were two other cases involving instances of negligent supervision: *Ryan v. Fahey*, 352 N.Y.S.2d 283 (1974), and *Graney v. Graney*, 350 N.Y.S.2d 207 (1973).

³⁹ See, *e.g.*, *Pravato v. Pravato*, 571 N.Y.S.2d 811 (1991) (action premised on negligent supervision not actionable under New York law); *Parsons v. Wham-O, Inc.*, 541 N.Y.S.2d 44 (1989) (parent's failure to properly instruct child on use of water slide was negligent supervision not actionable in a third-party claim for contribution).

⁴⁰ *Holodook*, 324 N.E.2d at 343.

⁴¹ For a thorough discussion of *Holodook* and similar cases, see Schreiber, *supra* note 13.

⁴² 122 N.W.2d 193 (Wis. 1963).

⁴³ *Id.*

⁴⁴ In *Mancinelli v. Crosby*, 589 A.2d 664 (N.J. 1991), the court determined that acts of willful or wanton supervisory misconduct were not protected by parental immunity. In reaching its conclusion, the court engaged in the following four-part analysis: (1) Could a finder of fact determine that the alleged negligent acts or omissions by the parent were a proximate cause of the child's injuries? (2) If "yes," did the act or omission come within the protected spheres of parental authority or the provision of customary child care, such that immunity would be afforded as a defense to the parent? (3) If the conduct was protected,

though, that the assignment of this function to the judiciary has failed to yield a uniform interpretation as to what types of conduct constitute exercises of parental authority or customary child care. Consequently, ambiguity and what are arguably overly restrictive applications of the *Goller* standard have resulted.⁴⁵

Dissatisfaction with the *Goller* decision became evident in the California Supreme Court's decision in *Gibson v. Gibson*.⁴⁶ First, the court argued that adherence to the standard set forth in *Goller* would "inevitably result in the drawing of arbitrary distinctions about when particular parental conduct falls within or without the immunity guidelines."⁴⁷ As noted *supra*,⁴⁸ such arbitrary distinctions seem to be an inevitable result of assigning courts the task of determining what type of conduct is actually protected. Second, the *Gibson* court found "intolerable the notion that if a parent can succeed in bringing himself within the 'safety' of parental immunity, he may act negligently with impunity."⁴⁹ The court recognized that "although a parent has the prerogative and the duty to exercise authority over his minor child, this prerogative must be exercised within reasonable limits."⁵⁰ Consequently, the *Gibson* court

did it constitute a lack of parental supervision? (4) If "yes," could a trier of fact determine that the lack of parental supervision amounted to willful or wanton supervisory misconduct? If so, immunity would not be afforded to the parent. *Id.* at 666 (citing *Murray by Olsen v. Shimolla*, 555 A.2d 24 (N.J. 1989)).

In *Ashley v. Bronson*, 473 N.W.2d 757 (Mich. 1991), the court determined that a father's decision to build a pool was an exercise of reasonable parental discretion regarding the provision of housing for his family. Accordingly, the father would be immune from suit brought on behalf of a deceased child who drowned in the pool, because Michigan recognizes an exception to the abrogation of parental immunity for alleged negligent acts involving the exercise of reasonable parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care (citing *Plumley v. Klein*, 199 N.W.2d 169 (Mich. 1972)).

⁴⁵ In *Schmidt v. United States*, 369 F. Supp. 64 (E.D. Wis. 1974), for instance, the court determined that parents could be held liable for injuries sustained by their children as a result of an accident caused by the alleged negligent operation of a motor vehicle by the parent when driving the children home from high school. In reaching this conclusion, the court found that the operation of a motor vehicle was not "other care" under the *Goller* standard, nor otherwise within the scope of everyday acts of upbringing.

Similarly, in *Horn v. Horn*, 630 S.W.2d 70 (Ky. 1982), the court sustained an action by a child against his parent for injuries the boy sustained while riding a trail bike alongside his father. The court held that the father was not entitled to parental immunity because the activity did not involve disciplining the child, nor an exercise of discretion in providing care and necessities which he as a parent was legally obligated to furnish.

⁴⁶ 479 P.2d 648 (Ca. 1971) (en banc).

⁴⁷ *Id.* at 653.

⁴⁸ See *supra* note 45 and accompanying text.

⁴⁹ 479 P.2d at 653.

⁵⁰ *Id.*

formulated a standard that would assess parental conduct on the basis of what "an ordinarily reasonable and prudent *parent* [would] have done in similar circumstances."⁵¹ In accordance with the *Gibson* standard, acts or omissions that an ordinarily reasonable and prudent parent in similar circumstances would have committed are protected by parental immunity, while acts which fail to satisfy this standard may render the parent subject to liability.⁵² Commentators and other legal authorities have praised the reasonably prudent parent standard as one promising to assist the courts in achieving the desired balance between autonomy and equity in the parent-child relationship.⁵³

III. EXPLORING THE BOUNDARIES OF PARENTAL IMMUNITY IN RECENT DECISIONS: *BARNES* AND *JILANI*

Contemporary courts concur in the belief that parental immunity is neither an absolute shield to liability nor a completely antiquated defense best left to the annals of American legal history. Regrettably, however, general agreement on this assertion and even the widespread adoption by courts of the *Goller* and *Gibson* standards have failed to produce a relatively consistent and coherent understanding of parental immunity. While divergent interpretations of parental

⁵¹ *Id.*

⁵² See, e.g., *Tabor v. Doctors Memorial Hosp.*, 563 So. 2d 233 (La. 1990); *Convery v. Maczka*, 394 A.2d 1250 (N.J. 1978).

In the sphere of governmental immunity, courts have drawn a distinction between discretionary decisions and their subsequent execution. Thus, it has been generally understood that liability may not be imposed for "the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion." *Reynolds v. State*, 471 N.E.2d 776, 778 (Ohio 1984). However, "once the decision has been made to engage in a certain activity or function," courts recognize that "the state may be held liable . . . for the negligence of the actions of its employees and agents in the performance of such activities." *Id.* While the logic of such a distinction may be persuasive, courts invoking the types of categorical immunity described in *Goller* have not engaged in a similar type of analysis. Rather, decisions like *Convery* reflect a general concurrence among jurisdictions that in traditional areas like discipline or the provision of medical care, parental immunity exists for both the discretionary choice and the consequences of its execution.

⁵³ The *Restatement (Second) of Torts* notes that with respect to the day-to-day parental activities of authority and supervisory conduct, "[p]arental discretion is involved, and to say that the standard of a reasonable prudent parent is applied should be to recognize the existence of that discretion and thus to require that the conduct be palpably unreasonable in order to impose liability." RESTATEMENT (SECOND) OF TORTS § 895G, cmt. k at 431 (1979). The *Restatement* goes on to state that the reasonable prudent parent standard "seems more appropriate than the granting of a categorical immunity for these types of activities, regardless of the blatancy of the negligence or the willfulness of the conduct." *Id.*

immunity are due no doubt in part to distinct precedents and legislative action⁵⁴ established among the various state and federal jurisdictions, the single greatest source of ambiguity and confusion with respect to the doctrine seems to be a fundamental disagreement on its scope. An examination of two relatively recent decisions makes manifest the complications courts have encountered in defining the scope of parental immunity.

A. *The Jilani Decision*

In *Jilani v. Jilani*,⁵⁵ the Supreme Court of Texas was asked to rule whether parental immunity could serve as a defense to an action premised on a parent's alleged negligent operation of a motor vehicle.⁵⁶ The action was brought on behalf of three unemancipated minor children by their mother for injuries the children sustained in a motor vehicle accident caused by the alleged negligence of the driver, the children's father.⁵⁷ Citing precedential authority, the *Jilani* court went on to consider whether the facts of the case *sub judice* fell within the sphere of protected parental conduct, *i.e.*, "alleged acts of ordinary negligence which involve a reasonable exercise of parental authority or the exercise of ordinary parental discretion with respect to provisions for the care and necessities of the child."⁵⁸

The court's majority opinion, by Justice Spears, noted that "[t]he familial obligations and duties imposed by law and nature are quite different from the general obligation the law imposes upon every driver of an automobile."⁵⁹ Accordingly, the court determined that parental immunity would not serve as a defense in the case before it. Establishing that "immunity is limited to transactions that are essentially parental," the court went on to find that "the essence of the alleged negligence was the improper operation of a motor

⁵⁴ Two states, Connecticut and North Carolina, have enacted legislation abrogating the parental immunity defense in actions arising from motor vehicle accidents. *See* CONN. GEN. STAT. ANN. § 52-572c (West 1979); N.C. GEN. STAT. § 1-539.21 (1989).

Similarly, an Indiana court found in the decision of *Buffalo v. Buffalo*, 441 N.E.2d 711 (Ind. 1982), that Indiana Code section 9-3-3-1 (now codified in IND. CODE ANN. § 34-4-40-3 (West Supp. 1992)), would permit a child or stepchild to bring an action for injuries sustained in a motor vehicle accident when the driver-parent's operation of the vehicle constituted willful or wanton misconduct. *See also* *Davidson v. Davidson*, 558 N.E.2d 849 (Ind. 1990).

⁵⁵ 767 S.W.2d 671 (Tex. 1988).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 672 (citing *Felderhoff v. Felderhoff*, 473 S.W.2d 923, 933 (Tex. 1971)). Consider that the standard for assessing protected parental conduct set forth in *Felderhoff* does not differ substantially from the categorical immunity described in *Goller*. *See supra* notes 42-45.

⁵⁹ *Jilani*, 767 S.W.2d at 673.

vehicle—an activity not essentially parental.”⁶⁰ Though the court conceded that the accident transpired while the family was on vacation, it nonetheless determined that this fact was inconsequential in regard to the ultimate holding of the case.⁶¹ Wary of the risk of “substituting judicial discretion for parental discretion in the care and rearing of minor children,” the court limited its holding to the specific facts before it—“an automobile tort action brought by an unemancipated minor child against a parent.”⁶²

A concurring opinion by Justice Mauzy emphasized the existence of liability insurance as a factor worthy of consideration for courts deciding whether or not to extend parental immunity in a particular case.⁶³ Specifically, in instances where adequate coverage existed, there would be no disruption of family harmony nor a danger of depleting the family funds, as the action was essentially between the injured child and the parent’s liability insurer.⁶⁴ In conclusion, the concurring opinion recommended legislation via a “direct action” statute which would permit the injured party to pursue a direct action against the tortfeasor’s liability insurer.⁶⁵

Strong dissenting opinions written by Justices Cook and Gonzalez criticized the court’s narrow reading of the standard enunciated in *Felderhoff*. Arguing that the majority opinion failed to give sufficient credence to the fact that the Jilanis were in fact on a recreation trip when the accident occurred, Justice Cook noted that “*Felderhoff* specifically enumerated ‘the provision of a home, food, schooling, family chores, medical care, and recreation’ as within the scope of parental discretion.”⁶⁶ Similarly, Justice Gonzalez emphasized that given the facts before the court, “[t]he operative fact is not that the injury occurred in an automobile, but that the family was on vacation.”⁶⁷ Both dissenting Justices agreed further in their belief that permitting unemancipated minor children to sue a parent would unnecessarily disrupt the domestic harmony and order crucial to family life.⁶⁸ Reflection on the departing views of

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 674 (Mauzy, J., concurring).

⁶⁴ *Id.* at 674–75.

⁶⁵ *Id.* at 675–76. For a further, favorable discussion of Justice Mauzy’s recommendation for a direct action statute, see Chanse McLeod, Note, *Jilani v. Jilani: The Erosion of the Parental Tort Immunity Doctrine in Texas*, 28 HOUS. L. REV. 717 (1991).

⁶⁶ *Jilani*, 767 S.W.2d at 677 (Cook, J., dissenting) (citing *Felderhoff*, 473 S.W.2d at 933).

⁶⁷ *Id.* at 678 (Gonzalez, J., dissenting).

⁶⁸ In his dissenting opinion, Justice Cook asserted:

The relationship between a parent and child is unique. It involves elements of love, trust, confidence, and independence that must be exercised continuously by parents in carrying out their demanding and burdensome duties. Parents are the primary role

the majority and dissenters in *Jilani* serves no doubt to illustrate the complications encountered by courts attempting to define the parameters of the parental immunity doctrine.

B. *The Barnes Decision*

Further evidence of the difficulties courts have had in applying the concept of parental immunity is found in the decision of *Barnes v. Barnes*.⁶⁹ In *Barnes*, a daughter sought compensation for rape and assault suffered at the hands of her father when she was fifteen.⁷⁰ On appeal from the trial court's decision awarding the daughter \$3,250,000 in compensatory and punitive damages, the father sought to have the decision reversed on the grounds of parental immunity.⁷¹ The first issue demanding resolution in *Barnes* was whether the "de facto" marital separation of the parents at the time of the alleged occurrence deprived the father from claiming the parental immunity defense.⁷² Finding a prior decision which denied divorced, non-custodial parents immunity inapposite to the facts before it, the *Barnes* court reasoned that joint custody by both parents over their daughter (by virtue of their marriage at the time the incident transpired) permitted the father to maintain the defense on appeal.⁷³

The second issue facing the *Barnes* court was whether the concept of parental immunity itself had ceased to serve the needs of the family in modern society. The court rejected the notion that the earlier decision of *Buffalo v.*

models for children. Children learn from what they see their parents do; a holding such as this can only encourage and breed a more litigious society.

Id. at 677 (Cook, J., dissenting). In analogous fashion, Judge Gonzalez cited the following language from *Felderhoff* with approval:

Harmonious family relationships depend on filial and parental love and respect which can neither be created nor preserved by legislatures or courts. The most we can do is to prevent the judicial system from being used to disrupt the wide sphere of reasonable discretion which is necessary in order for parents to properly exercise their responsibility to provide nurture, care, and discipline for their children.

Id. at 679 (Gonzalez, J., dissenting) (citing *Felderhoff*, 473 S.W.2d at 933).

⁶⁹ 566 N.E.2d 1042 (Ind. 1991).

⁷⁰ *Id.* at 1043.

⁷¹ *Id.*

⁷² *Id.* at 1044.

⁷³ *Id.* The court noted that the facts of the *Barnes* case were sufficiently distinct from those found in *Buffalo v. Buffalo*, 441 N.E.2d 711 (Ind. 1982), in which the lack of custody over a minor child by a divorced parent negated the justifications (*i.e.*, preservation of domestic peace and tranquility) supporting application of the parental immunity rule.

Buffalo, which recognized a statutory exception to parental immunity in instances where a parent's operation of a motor vehicle constituted willful or wanton misconduct, signaled a "legislative disapproval of parental immunity" or otherwise indicated a judicial intolerance for that common-law defense.⁷⁴ To the contrary, the court cited precedent which "clearly contemplated suits based on allegations such as those in this case—*i.e.*, 'the ravishment of a minor daughter by her father.'"⁷⁵ Though admitting the "disturbing" result of its decision, (*i.e.*, barring the daughter's suit on grounds of parental immunity), the *Barnes* court nonetheless argued that "the wronged party is not without a remedy," which in this instance would be "to cause the offender to forfeit custody and be incarcerated under the criminal processes rather than allow the victim to seek monetary compensation."⁷⁶ In its continued reliance on the precedent of *Smith v. Smith*, the court reiterated the justification for its decision as a "reluctance to disturb the fragile balance which maintains this important institution" of the family.⁷⁷ A seemingly apologetic conclusion found the court

⁷⁴ 566 N.E.2d at 1044–45. The court held that the legislative intent underlying Indiana Code section 9-3-3-1 (now codified in IND. CODE ANN. § 34-4-40-3 (West Supp. 1992)) was not indicative of any desire on the part of the Indiana Legislature to abolish parental immunity.

⁷⁵ *Id.* at 1045 (citing *Smith v. Smith*, 142 N.E. 128, 129 (Ind. 1924)).

⁷⁶ *Id.* In supporting criminal prosecution as the sole and proper redress to the grievances before it, the court argued the following:

The offender is thus removed from society, at least for a time, and the chances of a repeat offense are considerably decreased. Moreover, as the father of the victim, the child abuser or child molester still retains at least a partial responsibility to pay for the psychological and medical treatment of the child which was necessitated by his deviant conduct. Such was the case here, where John paid over \$160,000 for Polly's psychiatric care and institutionalization.

Id.

⁷⁷ *Id.* Concurrence with the rationale cited by the *Smith* court in support of parental immunity was evident in the following language:

From our knowledge of the social life of today, and the tendencies of the unrestrained youth of this generation, there appears to be much reason for the continuance of parental control during the child's minority, and that such control should not be embarrassed by conferring upon the child a right to civil redress against the parent under the circumstances stated in the question we are now considering. In our opinion, much reason exists for maintaining the sound public policy, which, as stated, underlies the rule which denies such redress. Extreme cases may arise, where it may seem harsh to deny the right, but we are governed by recognized rules, which must be uniformly applied. On the whole it seems far better to rely on the criminal law and the equity powers of the court to protect the child, where parental affection fails, even if they afford no redress for past wrongs, than to abandon the rule under consideration.

conceding that although "denial of civil redress might seem harsh, we deem a wholesale abolition of the parental immunity rule to be unwise, and we cannot find that the interest of consistency is served by adjudicating suits between parent and child on a case-by-case basis."⁷⁸

The "disturbing" ramifications of the majority's decision, reflected in the opinion itself, suggest the troubling aspects of parental immunity with respect to both the end reached in *Barnes* and the means by which that end was achieved and justified. Judge Conover's dissenting opinion called into question both the efficacy and the equity of a decision which barred a daughter's suit for rape in order to preserve domestic peace and tranquility, as well as parental authority and control.⁷⁹ Primary emphasis was placed on the dissenting justice's steadfast belief that "[i]mmunity from civil suit for the parent's commission of sexual transgressions upon his children simply does not exist under the mores of modern society."⁸⁰ Accordingly, abrogation of parental immunity (particularly in instances of sexual battery) would accord with Indiana's prior abrogation of interspousal immunity on the analogous grounds that it, too, failed to adequately serve contemporary public interest.⁸¹ Finally, the dissent argued that regardless of any persuasive rationales for abandoning parental immunity, the facts here fell clearly within a recognized exception to the parental immunity defense as an instance where the tortious parent lacked custody.⁸²

IV. THE PARENT AS DISCRETIONARY ACTOR: REDEFINING THE SCOPE OF PARENTAL IMMUNITY

The judicially created concept of parental immunity has engendered a wide range of discussion on a number of issues: What are the proper justifications which both permit and necessitate the existence of parental immunity? Are only parents entitled to claim the defense of immunity in response to actions premised on negligent or otherwise tortious conduct causing injury to unemancipated minors? What impact should the existence of liability insurance have on the parents' entitlement to the immunity defense? While these issues (and others) remain present for resolution in the current dialogue, the crux of the debate surrounding parental immunity continues to involve a determination of the proper scope of that defense.

Id. (citing *Smith*, 142 N.E.2d at 129).

⁷⁸ *Id.*

⁷⁹ *Id.* at 1046 (Conover, J., dissenting).

⁸⁰ *Id.*

⁸¹ *Id.* (citing *Brooks v. Robinson*, 284 N.E.2d 794 (Ind. 1972)).

⁸² *Id.* at 1047 (Conover, J., dissenting).

To be sure, discussion of the "scope" of parental immunity contemplates a comprehensive use of that term such that it encompasses both the application of the doctrine to a wide variety of contexts (e.g., are parents entitled to immunity when transporting their children in an automobile?), as well as its application to a wide variety of actors (e.g., are grandparents entitled to claim immunity in instances where their negligent or otherwise tortious conduct has contributed to the injury of their grandchildren?). Still, a comprehensive use of this term conveniently permits one to focus on the two central questions enmeshed in the current debate: To whom will parental immunity be extended, and to what extent shall that immunity exist?

The *Jilani* and *Barnes* decisions provide grounds not only for examining the factual scenarios in which claims to parental immunity are often asserted, but also serve to illustrate the manner in which courts have attempted to define the scope of parental immunity. Thus, the court in *Jilani* reasoned that on the basis of jurisdictional precedent, parental immunity would not be extended to instances of negligent operation of a motor vehicle since it did not involve "a reasonable exercise of parental authority or the exercise of ordinary parental discretion with respect to provisions for the care and necessities of the child."⁸³ Eschewing the *Gibson* standard of assessing parental conduct in light of the "ordinarily reasonable and prudent parent under similar circumstances,"⁸⁴ the *Jilani* court instead based its decision on a judicial determination of whether or not the alleged negligent conduct transpired within the traditional boundaries of parental authority or care.

In relative contrast to the *Jilani* decision, the discussion of parental immunity by the *Barnes* court did not focus particularly on whether or not the tortious actions of the father fell within a protected sphere of parental conduct. After determining that "de facto" marital separation did not deprive the father of the right to claim parental immunity, the court reasoned that immunity should be extended in order to preserve domestic harmony. Thus, the court concluded the proper remedy for the grievances before it was criminal prosecution and not civil liability.⁸⁵ It is significant, however, that the court's decision implicitly defined the "scope" of parental immunity: determining first that marriage and custody afforded the parental actor immunity, and second, that acts of rape and physical abuse did not necessarily constitute conduct beyond the parameters in which immunity would be granted.

In light of the opinions in *Jilani* and *Barnes*, and with reference to the "reasonably prudent parent under similar circumstances" standard enunciated in *Gibson*, a formidable task presents itself. Essentially, the task involves formulating a more comprehensive standard for assessing the "scope" of

⁸³ See *supra* note 58 and accompanying text.

⁸⁴ See *supra* note 51 and accompanying text.

⁸⁵ See *supra* notes 72-78 and accompanying text.

parental conduct with respect to the traditional immunity provided therein. Formulating such a standard would not constitute a departure from current law, but rather contemplates an integration of the categorical immunities provided in *Goller*⁸⁶ with the “reasonably prudent parent under similar circumstances” standard established in *Gibson*. While the paramount goal in formulating such a standard is the establishment of an equitable balance between the autonomous parent-child relationship and an injured child’s right to legal redress, the more immediate purpose served by such a standard would be to provide greater certainty and clarity of understanding with respect to the application of parental immunity.

The task of formulating such a standard is greatly enhanced through reference to a recent work by Professor Philip C. Sorensen regarding the duty of care exercised by corporate directors.⁸⁷ Though a cursory examination of this work would seem to suggest its limited application in the instant context, the immunity frequently afforded to corporate directors under the business judgment rule is clearly analogous to the immunity afforded to parents under the parental immunity doctrine.⁸⁸

Under the general concepts of ordinary negligence law, “choices regarding conduct and risks which bear upon liability are assumed to be made by the actor and victim independently and autonomously.”⁸⁹ However, the traditional understanding of the relationship between the parent and the unemancipated minor child contemplates a situation where the authority to make choices regarding conduct and risks is frequently wielded by a single actor—the parent. In such circumstances, the parental actor is deemed to possess what Professor Sorensen has termed “discretionary authority.”⁹⁰ Accordingly, parental actors who are granted such discretion enjoy “an authority to act on behalf of victims or to define the circumstances of their actions [and] will possess, as a consequence of that authority, the power to avoid liability.”⁹¹ The “dilemma” engendered by granting parents discretionary authority, however, becomes apparent in the numerous opinions where courts have attempted to define the proper scope and duty of care owing from parent to child (*i.e.*, the imposition of liability for acts deemed “unreasonable” in a context where parents

⁸⁶ 122 N.W.2d 193 (Wis. 1963).

⁸⁷ Philip C. Sorensen, *Discretion and its Limits—An Analytical Framework for Understanding and Applying the Duty of Care to Corporate Directors (and Others)*, 66 WASH. U. L.Q. 553 (1988).

⁸⁸ “[T]he analytical framework produced offers a guide for formulating standards of conduct in any situation where the actor, whether public or private, has a legitimate and independent claim to authority over matters dispositive of liability.” *Id.* at 557–58.

⁸⁹ *Id.* at 555.

⁹⁰ *Id.* at 556.

⁹¹ *Id.* at 564.

themselves “decide what is or is not unreasonable” for their children).⁹² Indeed, decisions such as *Jilani*, *Gibson*, and to a lesser extent *Barnes* embody judicial standards—via categorical expressions of immunity or application of the “reasonably prudent parent under similar circumstances”—which circumscribe the rather subjective nature of parental discretion. While the current legal standards remain both necessary and viable, this Note seeks primarily to describe a manner in which the integration of these standards may produce a more uniform and comprehensive understanding of parental immunity.

The task of formulating a more comprehensive standard for assessing parental conduct is enhanced by a re-examination of the bases for judicial deference to the parents’ discretionary authority. As noted in Part II-A, *supra*,⁹³ a number of rationales have been set forth by courts seeking to justify the grant of parental immunity: maintenance of domestic tranquility, a concern for preserving the family exchequer, and the prevention of fraud and collusion feared to be perpetrated by family members on liability insurers. It is noteworthy, however, that judicial deference to parental discretionary authority, and the immunity that discretion affords, are most logically premised on two grounds. The first ground involves the recognition that “there is no source equal to or better than the actor [(i.e., parent)] to determine the reasonableness or propriety of that conduct in the particular context.”⁹⁴ This basis of judicial deference to a parent’s discretionary authority is apparent in decisions which acknowledge that “[t]he parent is clearly in the best position to know the limitations and capabilities of his or her own children.”⁹⁵ The second ground for judicial deference to the discretionary authority of the parent arises from an acknowledgement that the interests protected by legal duties under ordinary negligence standards (i.e., the right to be compensated for harm proximately caused by the negligent conduct of another) are necessarily subordinated to the autonomous relationship which society recognizes as existing between parent and child.⁹⁶

Recognizing the aforementioned grounds as the most logical and persuasive bases for judicial deference to the discretionary authority of parents, it becomes necessary to define the manner in which judicial limits may be imposed on the discretionary authority of the parental actor. Again, it is by limiting the discretionary authority of parents that the equitable balance between the autonomous parent-child relationship and the child’s right to legal redress for his or her injuries may be most readily achieved. As suggested by Professor Sorensen, defining the proper scope of the parent’s discretionary authority (which in turn defines the extent to which parental immunity is granted)

⁹² *Id.* at 562–63.

⁹³ See *supra* notes 7–21 and accompanying text.

⁹⁴ Sorensen, *supra* note 87, at 567.

⁹⁵ *Foldi v. Jeffries*, 461 A.2d 1145, 1152 (N.J. 1981).

⁹⁶ Sorensen, *supra* note 87, at 569.

involves the application of two tests. The first test establishes limits of context, scope, and exercise on parental discretion.⁹⁷ The second test would involve a measure of the parent's conduct against the standard of a reasonably prudent parent under similar circumstances.⁹⁸

Contextual limits imposed on the parent (and others) are evident under current law. For instance, courts have found that those standing *in loco parentis* to the child merit the type of deference normally reserved for parents.⁹⁹ Accordingly, a judicial assessment of whether or not an individual was acting within the parental context would determine whether normal standards of care or the type of deference which produces parental immunity would be applied. Further application of the limits of context imposed on the parent are evident in decisions which have considered whether or not parental immunity applies to non-custodial parents or those interacting with their children while in the scope of employment.¹⁰⁰

Limits of scope imposed on the parent as discretionary actor would derive from a number of sources. Acceptance of the standards set forth in decisions like *Goller*, as advocated by this Note, suggests that deference to the parent as discretionary actor (and the immunity which that deference produces) is logical

⁹⁷ Application of limits of context, scope and exercise to the discretionary actor operates on the premise that within these defined boundaries, "[d]eference to . . . [the parents'] discretionary authority forbids the application of normal standards of conduct, but conduct beyond the limits of that authority has no such claim to deference." *Id.* at 582.

⁹⁸ The second test applicable to the discretionary acts of a corporate director, that of net economic utility, is described by Professor Sorensen in the following manner:

(2) The conduct of the director would, to an ordinarily prudent director in a like position and under similar circumstances, lack net economic utility to the corporation, normally manifested by a situation where, as calculated at the time of the conduct in question, the economic costs exceed economic benefits.

Id. at 580.

Formulation of a standard for assessing the discretion of the parental actor, however, necessitates departure from the net economic utility test. While a cost-benefit analysis of parental decision-making is not inconceivable, it is far more subjective, and thus difficult to assess, than in the context of determining the economic utility of actions taken by a corporate director. Indeed, the unique parent-child relationship is far less susceptible to the type of scrutiny imposed on corporate directors, which generally proceeds through an assessment of tangible economic factors such as production or loss of profit. Rather than force the issue, it is suggested that parental conduct beyond the established discretionary limits of context, scope, and exercise be assessed under a standard of the "reasonably prudent parent under similar circumstances" and without specific reference to the notion of net economic utility.

⁹⁹ See *supra* notes 22-27 and accompanying text.

¹⁰⁰ See *supra* notes 28-29 and accompanying text.

when the parental conduct at issue involves an exercise of (1) parental authority over the child or (2) ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, or other care.¹⁰¹ Similarly, a finding that the conduct at issue involved an alleged act of negligent parental supervision would not result in the abrogation of immunity, accepting of course the notion that supervision is within the discretionary scope of the parental actor.¹⁰² Other sources from which limits on the scope of parental discretion may be derived include standards of grossly negligent or willfully reckless conduct as well as criminal prohibitions on intentionally tortious actions like physical and sexual abuse.¹⁰³

Limits of exercise on discretionary authority are more readily applicable in the realm of corporate directors, where issues of negligence frequently arise with respect to the process of making business decisions.¹⁰⁴ Such limits, however, are not wholly without value in assessing the conduct of the parental actor. Consider, for instance, a father who decides to take his young son hunting but fails to properly instruct the youth on safely handling the firearm. Subsequently, the boy is injured when the gun discharges without the safety latch on. Assume for the moment that hunting is accepted as a normal activity in the parent-child relationship, such that deference to the discretionary authority of the father is generally presumed. However, if it were found that the father was negligent in *deciding* to take his son hunting (*i.e.*, in failing to adequately consider the boy's inexperience, weight, strength and other factors influencing his capacity to properly control the rifle), then the presumption of deference to the father's discretion would no longer apply.¹⁰⁵ This would not indicate, however, the automatic imposition of liability on the father. Rather, his conduct would be further assessed under the second test of the "reasonably prudent parent under similar circumstances" in order to determine if immunity should be granted.

The second test suggested here contemplates departure from that proposed by the author in *Discretion and its Limits*.¹⁰⁶ In the first respect, departure is

¹⁰¹ See *supra* notes 43-45 and accompanying text.

¹⁰² See *supra* notes 39-42 and accompanying text.

¹⁰³ See *supra* notes 36-38 and accompanying text.

¹⁰⁴ See Sorensen, *supra* note 87, at 586.

¹⁰⁵ Failure to properly exercise parental authority, then, could result in liability despite the fact that the decision itself (*i.e.*, to have the unemancipated minor participate in hunting) was one traditionally afforded immunity. In this way, the doctrine of parental immunity would further reflect that of sovereign immunity, where protection is granted only for the decision and not for its subsequent execution. See *supra* note 52 and accompanying text.

Similarly, one might analogize the potentially negligent actions of the father as violations of a duty of ordinary care owing to the world at large. See *supra* notes 34-35 and accompanying text.

¹⁰⁶ See *supra* note 97 and accompanying text.

symbolized by the reconceptualization of the test itself: instead of focusing on the net economic utility of parental conduct toward the child, parental conduct is to be assessed with reference to the standard of an "ordinarily reasonable and prudent parent under similar circumstances." Furthermore, the second test would not necessarily be applied conjunctively in all instances; rather, it would be applied only in instances where parental conduct was found to have breached discretionary limits of context, scope, or exercise. This departure is justified not only by the unique status of the parent-child relationship, but also by the jurisprudential standards and precedent which have shaped the concept of parental immunity from its inception. Under the standard thus formulated, parental conduct falling outside of the parents' discretionary authority may produce liability, but only if it constitutes a breach of the standard of the "ordinarily reasonable and prudent parent under similar circumstances."¹⁰⁷

A re-examination of the decisions in *Jilani* and *Barnes* provides an opportunity for the practical application of this standard. In *Jilani*, for instance, the majority opinion dictated that deference to the father as discretionary actor would not be justified because the operation of a motor vehicle, even in the context of a family recreational venture, was not within the limited scope of parental conduct. While the dissenting justices in *Jilani* set forth persuasive arguments to the contrary, it may be assumed *arguendo* that operation of a motor vehicle is not within the scope of parental discretionary authority. Under the standard described above, however, conduct beyond the limits of scope would not necessarily imply the imposition of liability; rather, liability would be imposed if the father was found to have breached the standard of the ordinarily reasonable and prudent parent under like circumstances.

Consider as well an application of this standard to the facts presented in *Barnes*. While the majority and dissenting opinions disagreed as to whether or not "de facto" marital separation constituted an instance of the father acting outside the context of parental discretion, it may again be assumed *arguendo* that the limits of context were not transcended. In contrast to the majority opinion, however, it would be arguable that violation of criminal statutes prohibiting rape and assault in any context would constitute conduct beyond the scope of the parent's discretionary authority. As the presumption of deference to that authority would no longer apply, the father's conduct would correspondingly be assessed with reference to the standard of the ordinarily reasonable and prudent parent under similar circumstances. Accepting the premise that such conduct would in any event breach that standard, it becomes apparent that liability would be imposed.

¹⁰⁷ This model for assessing parental conduct, despite the aforementioned departures, would thus reflect the principles applied by Professor Sorensen: "Conduct that does fall outside the directors' discretionary authority can produce liability, but only if it lacks net economic utility to the corporation." Sorensen, *supra* note 87, at 589.

V. CONCLUSION

Recent opinions invoking parental immunity have focused on a variety of elements pertinent to that doctrine's application. A review of these decisions, however, fails to yield a comprehensive and clarified understanding of the doctrine's function and purpose. While current jurisprudential standards have adequately defined the crucial issues inherent in the concept of parental immunity, the continuing viability of the doctrine depends on a refined understanding of its scope and purpose. Viewing the parent as a discretionary actor whose authority is circumscribed by limits of scope, context, exercise, and the standard of the "ordinarily reasonable and prudent parent under similar circumstances" should significantly enhance this understanding.

Clearly, the standard for assessing parental conduct as proposed by this Note will not resolve all ambiguities and complications arising from the application of the parental immunity doctrine. Reasonable minds are sure to differ as to what acts are within the limits of context, scope, and exercise where immunity is afforded, and mixed questions of law and fact are certain to arise in ascertaining those limits. What the standard does promise, however, is a more clarified understanding of the nature of parental immunity. By applying an analytical framework which subsumes the numerous issues and elements arising in the sphere of parental immunity, courts may render decisions which invoke—or refute—the logic of judicial precedent in a more consistent and comprehensive fashion. The goals to be realized are not only increased uniformity and clarity, but the paramount objective of establishing an equitable balance between the autonomous parent-child relationship and an injured child's right to legal redress.

Samuel Mark Pipino

